JUL 31 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 74-39

RICHARD MURRAY KLEBS,

Petitioner,

vs.

STATE OF INDIANA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS

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STATE OF INDIANA,

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PETITION FOR WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS

To The Chief Justice Of The United States And Associate Justices Of The United States Supreme Court:

OPINION BELOW

Petitioner/Defendant, Richard Murray Klebs, respectfully asks this Court to issue a Writ of Certiorari to the Indiana Court of Appeals to review that Court's judgment in an action known as *Richard Murray Klebs, De-*

fendant/Appellant v. *State of Indiana, Plaintiff/Appellee,* under their Cause No. 3 873 A 103 decided January 15, 1974, and made final on May 3, 1974. The report of that decision can be found at ..... Ind. App. ....., and 305 N.E. 2d 781. A copy of the slip sheet decision is appended as Appendix A. A copy of the Clerk's entry is appended as Appendix B.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. 1257(3) in that the decision below deprives the Petitioner of his rights and privileges guaranteed by the *Fourteenth Amendment of the United States Constitution.*

The Indiana Court of Appeals rendered its 3-0 decision on January 15, 1974. A Petition for Re-Hearing was timely filed but denied without opinion on February 2, 1974. (A copy of this Order is attached as Appendix C). A Petition to Transfer to the Indiana Supreme Court was timely filed and denied without opinion, but with a dissent, on May 3, 1974, thereby finalizing the January 15, 1974, Court of Appeals decision under Indiana law. (A copy of the Order on the Petition to Transfer is attached as Appendix D).

QUESTION PRESENTED

Whether In An Appellate Review Of A Conviction, The XIV Amendment Requires The State Appellate Court To Determine If There Is Substantial Evidence On Each Material Allegation Of The Crime Charged, To-Wit, Whether The Indiana Court Of Appeals Must Determine That There Exists In The Record Substantial Evidence Of Intoxication On A Charge Of Causing Death While Driving Under The Influence Of Intoxicants.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States — Amendment XIV

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTORY PROVISIONS INVOLVED

Indiana Code 9-4-1-54 (B.I.S.A. 47-2001)

". . . (1) Any person who while under the influence of intoxicating liquor or unlawfully under the influence of narcotic or other habit-forming or dangerous, depressant or stimulant drugs drives a vehicle and when so driving causes the death of anotner person, is guilty of a felony and, upon conviction, shall be imprisoned for an indeterminate period of not less than one (1) year nor more than five (5) years; or shall be imprisoned for an indeterminate period of not less than one (1) year nor more than two (2) years to which shall be added a fine of not less than two hundred fifty dollars ($250) nor more than five thousand dollars ($5,000) . . ."

Indiana Code 9-4-4.5-2 (B.I.S.A. 47-2003d)

"9-4-4.5-2 (47-2003d). Definitions.—(a) The term 'intoxication' for the purposes of this chapter (9-4-4.5-1—9-4-4.5-6) shall mean the same as the term 'under the influence', i.e., an impaired condition of thought and action and the loss of normal control of one's faculties to a marked degree, caused by the use of alcohol or drugs, or a combination of alcohol and drugs to such an extent as to endanger other persons using public highways . . ."

STATEMENT OF THE CASE AND STAGE AT WHICH FEDERAL QUESTION FIRST RAISED

The Petitioner was convicted in the Superior Court of Lake County after a bench trial of the charge of Causing Death While Driving Under the Influence. *Indiana Code 9-4-1-54; B.I.S.A. §47-2001.* Petitioner was sentenced from one to two (1-2) years and fined Five Hundred ($500.00)

Dollars. An appeal was filed in the Indiana Court of Appeals raising three (3) errors:

1. That the breathalyzer test results were improperly admitted into evidence without foundation;
2. That it was error to admit a copy of the breathalyzer test results in violation of the *best evidence* rule; and,
3. That the evidence was insufficient to support the finding.

The Court of Appeals basically sustained Petitioner's first two questions of error by excluding the breathalyzer test results and holding as a matter of law no proper foundation laid. The Court then affirmed the conviction reasoning that there was other evidence in the record to sustain proof of intoxication; namely, that the Defendant drove erratically and that he had consumed between eight and ten (8 and 10) bourbons and water with a steak dinner in a three and one-half (3½) hour period.

At this point the Petitioner assumed the position that an affirmation of his conviction after an exclusion of the breathalyzer test results raised the federal question. Klebs timely filed his Petition for Rehearing in the Court of Appeals stressing the new issue of the insufficiency of evidence. The rehearing was denied without argument. Klebs then timely filed his Petition to Transfer to the Indiana Supreme Court. This was also denied without argument or opinion, but with a dissent by Justice Roger DeBruler. At that time, the January 15, 1974, decision of the Court of Appeals became a final judgment under Indiana law. Klebs then timely filed this Petition for Writ of Certiorari to the Indiana Court of Appeals.

ARGUMENT

Whether In An Appellate Review Of A Conviction, The XIV Amendment Requires The State Appellate Court To Determine If There Is Substantial Evidence On Each Material Allegation Of The Crime Charged, To-Wit, Whether The Indiana Court Of Appeals Must Determine That There Exists In The Record Substantial Evidence Of Intoxication On A Charge Of Causing Death While Driving Under The Influence Of Intoxicants.

The Fourteenth Amendment to the United States Constitution requires that in state criminal prosecutions the proof of guilt be beyond a reasonable doubt as to each material allegation. *Re Winship*, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970).

In this case, Petitioner contends that there is a failure of evidence on the question of intoxication. The question is a material one to the Charge of Causing Death While Driving Under the Influence of Intoxicants. *Indiana Code 9-4-1-54 (B.I.S.A. §47-2001).*

State's Witness Norma Carr, on unimpeached direct examination by the Prosecutor, testified that she has had experience as a bartender in observing intoxicated individuals; further, that in her opinion Klebs was not intoxicated. The overwhelming significance of her testimony is that she was the last person to see Petitioner only a few minutes before the accident in question. State's Witness Kenneth Mitchell testified that in his capacity as a Captain of the Hammond Fire Department he has had the opportunity to observe intoxicated individuals and that he was of the opinion that Petitioner was not in-

toxicated. Captain Mitchell further stated that Klebs did not smell of intoxicants, did not stagger, and generally did not exhibit physical signs of intoxication. The significance of Captain Mitchell's testimony is that he saw Klebs immediately after he was released from police custody to be taken to the hospital for treatment of injuries.

The only evidence of intoxication in the record was the testimony that Petitioner drank eight to ten (8-10) bourbons and waters and ate a steak dinner in a three and one-half (3½) hour period; and, that he drove erratically.

Petitioner would first of all suggest that knowledge that he had eight to ten (8-10) drinks in a three and one-half (3½) hour period without evidence as to their size, per cent of alcohol contained, weight and other physical characteristics of Petitioner, etc., renders this evidence incompetent. Even assuming arguendo though, that the evidence is competent without other expert testimony to explain the effect on Klebs, the evidence is at best circumstantial requiring an inference on an inference on an inference to arrive at the conclusion of intoxication. That is to say, the trial judge would have had to infer that the eight to ten (8-10) drinks were of a particular size, that they contained a particular per cent of alcohol and finally, that Klebs' physical makeup would have resulted in intoxication.

To summarize, the only evidence on intoxication is (if the objection to competency is overcome), testimony of eight to ten (8-10) drinks with a dinner in a three and one-half (3½) hour period and erratic driving. Other evidence in the record indicated another possible cause of the accident, namely, strong nauseating paint fumes in

Klebs' car. This was testified to by Defendant's witness Joanne Klebs and two (2) State's witnesses, Richard Miles and Bernard Strijak. State's Witness Charles Powers testified that it was raining very hard and road conditions were dangerous, giving rise to an inference indicating the cause of the accident could have been something other than intoxication.

Petitioner realizes that he has belabored the facts, but a complete understanding of all relevant evidence on intoxication is necessary for this argument. The Court should also note that under Indiana law, the term intoxication is synonymous with an impaired condition of thought and action, so as to create a loss of normal control of one's faculties to a marked degree under the drunk driving statute. *Indiana Code 9-4-4.5-2 (B.I.S.A. 47-2003[d]).*

In *Thompson* v. *Louisville,* 362 U.S. 199, 4 L. Ed. 2d 654, 80 S. Ct. 624 (1960), the Court held that Petitioner's conviction should be reversed because there was a total void of evidence indicating guilt. *Thompson, supra,* presented an unusual situation of conviction without any evidence. In other cases, the Court has held that there must be substantial evidence as to all the elements of the crime charged. *Christoffel* v. *United States,* 338 U.S. 84, 93 L. Ed. 1826, 69 S. Ct. 1447 (1949); *Abrams* v. *United States,* 250 U.S. 616, 63 L. Ed. 1173, 40 S. Ct. 17 (1919) and *Stitson* v. *United States,* 250 U.S. 583, 63 L. Ed. 1154, 40 S. Ct. 28 (1919).

The issue in the case at hand is what test should a state appellate court apply when there is a challenge to the sufficiency of evidence as is required by the *Four-*

teenth Amendment to the United States Constitution (and probably every state constitution, too).

In the leading case of *State* v. *Gregory*, 339 Mo. 133, 96 S.W. 2d 47 (1936), the Defendant was charged with robbery in the first degree. The evidence was very lengthy and contradictory. The Missouri Court held:

> ". . . [It] must in all cases scrutinize the record to see if the verdict was supported by substantial evidence. [In this state] the scintilla doctrine does not prevail." 96 S.W. 2d 47 at 51.

The Court went on to say:

> "Now since the test of substantial evidence is whether a jury reasonably could find the issue thereon, the result must depend in some measure upon the degree of persuasion required. In a criminal case liberty and sometimes life are involved, and there cannot be a conviction except upon a finding of guilt beyond a reasonable doubt. Necessarily, therefore, it becomes the duty of an appellate court as a matter of law to decide whether the evidence was sufficient to induce a belief of the defendant's guilt beyond a reasonable doubt in the minds of the jurors of average reason and intelligence; and in resolving the question the Court undoubtedly can pass on the credibility of the testimony to the extent of determining it was substantial in the sense above explained. In no other way can the rights of a defendant be protected. It would be an incongruous situation if the Court were compelled to let a conviction stand as being supported by evidence warranting a verdict of guilt beyond a reasonable doubt, when for any reason made manifest upon the record the Court is convinced the evidence reasonably could not support a conviction.

> "In so holding we are not to be understood as departing from the rule . . . that this Court will not weigh the evidence in a criminal case if the verdict below was supported by substantial evidence." 96 S.W. 2d 47 at 52 and 53.

The holding in *State* v. *Gregory,* 339 Mo. 133, 96 S.W. 2d 47 (1936), is a generally accepted doctrine. *West's Decennial Digest System,* Criminal Law No. 552(3).

The Indiana Supreme Court in *Easton* v. *State,* 248 Ind. 334, 228 N.E. 2d 816 (1953) adopted the *State* v. *Gregory, supra,* holding. In *Klebs,* the Court of Appeals has reversed the *Easton* reasoning. Since the Indiana Supreme Court has denied transfer, there is at least an implicit approval of the Court of Appeal's decision. *Garner* v. *Louisiana,* 368 U.S. 157 at 187, 7 L. Ed. 2d 207, 82 S. Ct. 248 (1961) (J. Harlan's concurring opinion).

Petitioner contends that the Fourteenth Amendment requires that upon a proper challenge to the sufficiency of the evidence, an appellate court must first determine if there is *substantial* evidence on each material allegation. If there is, the Court can affirm on that point. This is not the same as asking an appellate court to weigh the evidence and judge credibility of witnesses as the *Klebs'* Court says in its opinion.

It is far too convenient to recite the usual cut and dry "weight of evidence and credibility of witnesses" incantation when asked to review sufficiency of evidence. Using the holding in *State* v. *Gregory,* 339 Mo. 133, 96 S.W. 2d 47 (1936), it is inconceivable that the Klebs record would justify anything other than a reversal and order for new trial. *Klebs* presents a record manifestly showing non-intoxication, yet the Indiana Court of Appeals states:

> "Where two logical, but opposing, inferences are presented it is beyond the province of this Court to determine which should be accepted by the trier of fact." 305 N.E. 2d 781 at 785.

This is in reference to the fact that there was evidence of erratic driving, ergo, intoxication on the one hand; and, unequivocal testimony of non-intoxication by the two State's witnesses on the other hand. The Court erroneously recited that there were two (2) opposing inferences, but there were not. There was one slight inference of intoxication opposed by the strongest *direct* (non-inferential) evidence of non-intoxication.

If the Court of Appeals' decision is allowed to stand, consider for a moment what result might have been reached in the landmark *Thompson* v. *Louisville*, 362 U.S. 199, 4 L. Ed. 2d 654, 80 S. Ct. 624 (1960) case. There, Thompson was convicted of disorderly conduct and loitering under a Louisville ordinance. He was tried by a police court judge and fined Ten ($10.00) Dollars. No appeal was allowed under Kentucky law. This Court granted certiorari. Unanimously, the Court held there was no evidence on the material questions. If Thompson had been decided by the Indiana Court of Appeals applying its *Klebs* rationale the result might have been as follows:

> "It is properly within the province of the police court judge to believe any evidence favorable to the City of Louisville and to disbelieve all evidence unfavorable to it. The police officer testified that Thompson was in the cafe for over one-half (½) hour and bought nothing. This *could* give rise to an inference that Thompson was loafing without a proper account for himself in violation of the ordinance. This Court

> will not weigh the evidence. In short, since all evidence favorable to Thompson will not be considered, and, since we must draw all inferences favorable to the City, we must affirm.
>
> "Etc., etc., etc."

Obviously, any challenge to the sufficiency of evidence can be eliminated if the Court draws only inferences favorable to the State, refuses to look to any credibility questions, and, flatly refuses to in fact test the evidence for substantiality. In *Klebs*, the Court has apparently concluded that Witnesses Carr and Mitchell were disbelieved by the trial Judge. This is preposterous considering their testimony. It is sheer fiction to so hold. The trial Judge obviously convicted because of the breathalyzer test results. Since they have been excluded, there no longer exists substantial evidence of intoxication.

The *Fourteenth Amendment* requires an appellate Court to test the sufficiency of the evidence on each material issue when properly asked. It cannot sidestep the question by routine affirmance based on weight of evidence and credibility of witnesses' jargon.

It is respectfully submitted that certiorari should be granted because the Indiana Court of Appeals has not afforded Petitioner the proper review of the sufficiency of evidence.

CONCLUSION

Certiorari should be granted and the appropriate writ should issue to the Indiana Court of Appeals because the law of the *Klebs* case does not comply with the minimum standards this Court and the Constitution should require of state appellate court reviews of challenges to sufficiency of the evidence.

Respectfully submitted,

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APPENDIX A

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IN THE
COURT OF APPEALS OF INDIANA
FIRST DISTRICT

RICHARD MURRAY KLEBS,
Defendant-Appellant,

vs. Cause No. 3-873 A 103

STATE OF INDIANA,
Plaintiff-Appellee.

Appeal From The Lake Superior Court
The Honorable Andrew V. Giorgi, Judge

ROBERTSON, P.J.

The defendant-appellant (Klebs) was convicted in a bench trial of causing death while driving under the influence of liquor, IC 9-4-1-54, Ind. Ann. Stat. §47-2001 (Burns 1973). Klebs was sentenced from one to two years and fined $500. The three issues in his overruled motion to correct errors are:

1. Was the proper foundation laid for admission of the breathalyzer test results;
2. Was it error to admit a copy of the test results rather than the original document; and
3. Was the evidence sufficient to support the verdict?

When viewed most favorably to the State, the evidence discloses that during the late afternoon and early evening hours of May 5, 1972, Klebs visited the House of Stewart's Restaurant and Lounge in Hammond, Indiana. While there he consumed a steak dinner and between eight to ten bourbon and waters over a three and a half hour period. After Klebs departed he was involved in a head-on collision with another automobile a short distance from the restaurant. The driver of the other car died as a result of the accident. Eyewitnesses testified that Klebs auto had weaved across the center line of the road several times and that he had difficulty in negotiating a turn on to another street before the fatal collision. Following the accident police officers took Klebs to the Hammond Police Station where Lieutenant Awe administered the breathalyzer test pursuant to IC 9-4-4.5-1 and -3, Ind. Ann. Stat. § 48-2003c and § 47-2003e (Burns 1973). The test results indicated .19% by weight of alcohol in Klebs blood.

The Indiana legislature has provided that evidence of the alcohol content of a defendant's blood, as shown by a chemical analysis of his breath, is admissible as evidence. Evidence of .10% or more, by weight of alcohol in the defendant's blood, is prima facie evidence that he was under the influence of intoxicating liquor sufficiently to lessen his driving ability to such an extent as to endanger other persons using the public highways. IC

9-4-1-56, Ind. Ann. Stat. § 47-2003 (Burns 1973). Another statute sets forth certain requirements that must be met prior to the test results being accepted as evidence. That statute reads:

> "The director of the state department of toxicology of the Indiana University school of medicine is hereby authorized and empowered to adopt the necessary rules and regulations to set standards for the selection, training, certification and recertification of chemical test operators and to provide for the periodic inspection of chemical devices. *No chemical test for intoxication shall be considered as evidence for the purpose of this chapter* [9-4-4.5-1—9-4-4.5-6] *if it is not performed by a person certified as a valid operator by the state department of toxicology of the Indiana University school of medicine, and no equipment shall be used for such chemical tests which has not been inspected and approved under the rules and regulations* adopted by such department. . . ." (Emphasis added.)
>
> IC 9-4-4.5-6, Ind. Ann. Stat. § 47-2003h (Burns Code ed. 1973)[1]

The department of toxicology's rules and regulations filed pursuant to the foregoing statute provide in pertinent part:

> "C. Certification and recertification of chemical test operators.

---

[1] This statute was amended by the General Assembly in 1973, effective as of July 26, 1973. The language as set out above remained substantially intact. The primary change was the addition of provisions dealing with the certificates issued by the state department of toxicology and their evidentiary significance. Additionally, the chemicals used in the test are also to be inspected and approved by the department of toxicology. See IC 9-4-4.5-6, Ind. Ann. Stat. § 47-2003h (Burns 1973).

1. All persons who have successfully completed an approved course in the theory and operation of chemical test devices shall be certified as chemical test operators by the director of the department of toxicology.
2. Certification shall be valid for two [2] years from the date of certification. A certification card shall be issued to the certified operator and such card shall bear an expiration date.
3. Recertification procedure shall be determined by the director of the department of toxicology.
4. Those seeking recertification must attain a score of 70% or more on a written examination similar in content to the final examination given at the completion of the school for training chemical test operators and successfully completing actual breath tests using a chemical test device and a known water-alcohol solution in a breat test simulator. . . ."

Ind. Admin. Rules and Regulations Rule (47-2003h)-1 (Burns 1973).

The final statutory provision of concern to the instant case reads:

"(d) The term 'chemical test' for the purposes of this chapter means an analysis by such *persons using such techniques* and equipment *as shall have been approved by the department of toxicology* of the University school of medicine of the breath, blood, urine or other bodily substance for the determination of the presence of alcohol or drugs, or a combination of alcohol and drugs in such quantities as to constitute intoxication or 'under the influence' as that term may be defined by statute." (Emphasis added.)

IC 9-4-4.5-2, Ind. Ann. Stat. § 47-2003d (Burns Code ed. 1973).

From the foregoing statutes Klebs has extracted three requirements for a proper foundation for the admission of the test results. Those three requirements are:

1. The test was administered by an operator certified by the department of toxicology;

2. The equipment used in the test was inspected and approved by the department of toxicology, and

3. The operator used techniques approved by the department of toxicology.

It is the State's contention that these requirements were fulfilled.

We cannot conclude, as a matter of law, that the State sustained its burden in establishing a foundation for admission of the results of the breathalyzer test. There was a fatal evidentiary absence germane to each of the three requirements. There was no evidence to show the operator was certified within the two years prior to administering the test in the instant case as required by the rules prescribed by the department of toxicology. The operator's testimony said by the State to establish the machine's inspection and approval was as follows:

> "Q. Did you know of your own knowledge of its inspection and operating efficiency?
>
> A. Yes.
>
> Q. Would you state to the Court the degree of operating efficiency of the machine that you used and of which you are testifying about. Or perhaps instead of efficiency I should say accuracy.
>
> A. Plus or minus. I can't answer that."

We are of the opinion that this testimony falls short of establishing that the machine used to test Klebs had been properly inspected by the department of toxicology. Lieutenant Awe described the technique used to administer

the test in response to a preliminary voir dire by Klebs' counsel, however, the record is devoid of any evidence to establish that the procedure described resembled the procedure approved by the department of toxicology.

It is axiomatic that error also existed in admitting a copy of the results of the breathalyzer test irrespective of Klebs' position that the Exhibit violated the Best Evidence rule.

Although we have determined that error exists, it is our conclusion that such error is not reversible because of other proof establishing Klebs' guilt. Independent testimony regarding the amount of intoxicants consumed and the erratic driving culminating in the death of another was sufficient to prove the essential elements of the offense charged.

Klebs points out that none of the State's witnesses were of the opinion that he was intoxicated before or after the collision and that the presence of strong paint fumes in his vehicle and the lack of sleep prior to the incident could account for the manner in which Klebs drove. Where two logical, but opposing, inferences are presented it is beyond the province of this court to determine which should be accepted by the trier of fact. *Young* v. *State* (1971), ... Ind. ....., 273 N.E.2d 285. It is the trier of fact's province to decide which to believe. *Fisher* v. *State* (1973), ... Ind. ....., 291 N.E.2d 76; *Cravens* v. *State* (1971), ... Ind. ....., 275 N.E.2d 4. In determining whether the evidence was sufficient we will not weigh the evidence nor pass upon the credibility of witnesses, but will consider only that evidence together with the reasonable inferences that may be drawn therefrom

which supports the verdict of the trial court. *Sanchez* v. *State* (1971), 256 Ind. 140, 267 N.E.2d 374; *Glover* v. *State* (1970), 253 Ind. 536, 255 N.E.2d 657. Nor will we disturb the judgment of the trial court if there is substantial evidence of probative value to establish every material element of the crime charged beyond a reasonable doubt. *Phillips* v. *State* (1973), ... Ind. ....., 295 N.E. 2d 592; *Dunn* v. *State* (1973), ... Ind. ....., 293 N.E.2d 32.

Having found no reversible error the judgment of the trial court is affirmed.

LOWDERMILK and LYBROOK, JJ., concur.

APPENDIX B

STATE OF INDIANA
CLERK OF THE SUPREME COURT
AND COURT OF APPEALS

No. 3-873A103
RICHARD MURRAY KLEBS v. STATE OF INDIANA

You are hereby notified that the *Court of Appeals* has on this day *issued the enclosed opinion.*

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court,
this 15th day of January, 1974.

/s/ *Billie R. McCullough*
Clerk Supreme Court and
Court of Appeals

APPENDIX C

STATE OF INDIANA
CLERK OF THE SUPREME COURT
AND COURT OF APPEALS

No. 3-873A103
RICHARD MURRAY KLEBS v. STATE OF INDIANA

You are hereby notified that the *Indiana Court of Appeals* has on this day *Denied Appellants Petition for rehearing. Robertson, Acting C. J.*

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court,
this 21st day of Feb. 1974.

/s/ *Billie R. McCullough*
Clerk Supreme Court and
Court of Appeals

APPENDIX D

STATE OF INDIANA
CLERK OF THE SUPREME COURT
AND COURT OF APPEALS

No. 3-873A103
RICHARD MURRAY KLEBS v. STATE OF INDIANA

You are hereby notified that the *Supreme Court* has on this day *Petition to Transfer denied without Opinion. Donald H. Hunter, Acting C.J. DeBruler, J., dissents and would grant transfer.*

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court,
this 3rd day of May, 1974.

/s/ *Billie R. McCullough*
Clerk Supreme Court and
Court of Appeals

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SUPREME COURT, U. S.

74-59

Supreme
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MICHAEL R

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

NO. A1350

RICHARD MURRAY KLEBS,

Petitioner,

-vs-

STATE OF INDIANA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE INDIANA COURT OF APPEALS

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

NO. A1350

RICHARD MURRAY KLEBS,

Petitioner,

-vs-

STATE OF INDIANA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE INDIANA COURT OF APPEALS

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

NO. A1350

RICHARD MURRAY KLEBS,

Petitioner,

-vs-

STATE OF INDIANA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE INDIANA COURT OF APPEALS

BRIEF FOR RESPONDENT IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Court of Appeals of Indiana is reported in 305 N.E.2d 781.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether the decision of the Court of Appeals of Indiana that "Independent testimony regarding the amount of intoxicants consumed and the erratic driving culminating in the death of another was sufficient to prove the essential elements of the offense charged," deprived Petitioner of due process of law under the Fourteenth Amendment to the Constitution of the United States.

CONSTITUTIONAL PROVISION INVOLVED

The pertinent provision of the Constitution of the United States is set forth in the Petition on page 3.

STATUTORY PROVISIONS INVOLVED

Ind. Code 1971, 9-4-1-54 [Burns' Stat., §47-2001].

* * *

"(b) Operating or driving while under the influence of intoxicating liquor or narcotic or other drugs.

* * *

"(1) Any person who while under the influence of intoxicating liquor or unlawfully under the influence or other habit-forming or dangerous, depressant or stimulant drugs operates or drives a vehicle and when so operating or driving causes the death of another person, is guilty of a felony and, upon conviction, shall be imprisoned for an indeterminate period of not less than one year nor more than five years; or shall be imprisoned

for an indeterminate period of nos less than one year nor more than two years to which shall be added a fine of not less than two hundred fifty dollars nor more than five thousand dollars.

"* * *"

Ind. Code 1971, 9-4-4.5-2 Burns' Stat., 47-2003d given by Petitioner on page 4 of his Petition as the statutory provision involved is not involved herein because of the fact that its application is expressly limited to the Implied Consent Law (IC 9-4-4.5-1——9-4-4.5-6).

STATEMENT OF THE CASE

The Petitioner was convicted in the Superior Court of Lake County of the charge of Causing Death While Driving Under the Influence of Intoxicating Liquor (IC 9-4-1-54

[Burns' Stat., §47-2001] on March 8, 1973.

The evidence against him consisted of a Breatholyzer test showing his blood-alcohol content to be .19 by weight, (Tr. pp. 142-160, 55) the testimony of Norma Carr and Roland Britt, bartenders at the House of Stewart, Hammond, Indiana, that Petitioner had consumed eight to ten drinks of Canadian Club (bourbon whiskey) and water over a period of three and one-half hours (Tr. pp. 51-57), testimony of Clare E. Herbert that she saw Petitioner's automobile cross the center line and strike the decedent's car head-on, and then bounce back and hit her car (Tr. pp. 57-67), testimony of Richard Keith that Petitioner swerved to the left center of the road and hit the decedent's auto (Tr. pp. 67-77), and the testimony of Charles Powers

that the Petitioner was driving south in the middle of the north-bound lanes of the road when the accident occurred (Tr. pp. 77-82).

Petitioner appealed his conviction to the Court of Appeals of Indiana, alleging as error the admission of the Breatholyzer test into evidence and the insufficiency of the evidence to convict. The Court of Appeals affirmed the conviction, ruling that the State had failed to lay the proper foundation for admission of the Breatholyzer test into evidence, but that the testimony as to the quantity of liquor consumed by the Petitioner and the erratic manner of his driving were sufficient to sustain his conviction.

SUMMARY OF ARGUMENT

The decision of the Court of Appeals of Indiana that "Independent testimony regarding

the amount of intoxicants consumed and the erratic driving culminating in the death of another was sufficient to prove the essential elements of the offense charged," did not deprive Petitioner of due process of law under the Fourteenth Amendment to the Constitution of the United States because:

1. Proof of intoxication was not necessary to conviction of the offense with which Petitioner was charged.

2. There was uncontradicted evidence that Petitioner had drunk eight to ten drinks of bourbon and water during a three-and-a-half-hour period prior to the accident.

3. There was uncontradicted evidence of Petitioner's erratic driving immediately prior to the accident.

4. The trial court could draw on its personal knowledge and experience to estimate the alcoholic content of the drinks Petitioner had had.

5. The trial court observed Petitioner at the trial and could estimate his weight and so calculate the amount of alcohol necessary to impair his faculties sufficiently to cause the death complained of.

ARGUMENT

THE DECISION OF THE COURT OF APPEALS OF INDIANA THAT "INDEPENDENT TESTIMONY REGARDING THE AMOUNT OF INTOXICANTS CONSUMED AND THE ERRATIC DRIVING CULMINATING IN THE DEATH OF ANOTHER WAS SUFFICIENT TO PROVE THE ESSENTIAL ELEMENTS OF THE OFFENSE CHARGED," DID NOT DEPRIVE PETITIONER OF DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

I.

Petitioner argues that there is a failure of evidence of the question of intox-

ication and points out the testimony of Norma Carr, the bartender, and Captain Mitchell of the Hammond Fire Department that Petitioner was not intoxicated. However, neither of these witnesses nor any other witness testified that Petitioner was not under the influence of intoxicants. His intoxication was not an issue in the case. Being under the influence of intoxicants is not the same as being intoxicated. Petitioner cites IC 9-4-4.5-2 as authority for the proposition that intoxication is synonymous with "under the influence". However, he overlooks the words "for the purposes of this chapter[9-4-4.5-1——9-4-4.5-6]" in IC 9-4-4.5-2(a), which strictly limits the application of the definition and makes it inapplicable to IC 9-4-1-54, the section under which Petitioner was tried and con-

victed.

In Klaser v. State, (1929), 89 Ind.App. 561, 166 N.E. 21, the Appellate Court of Indiana construed a similar act to the one in question as follows:

> "The offense defined by the statute is not the operation of a motor vehicle by one who is drunk or intoxicated, but 'while under the influence of intoxicating liquor.' It is evident that in the enactment of the statute the lawmakers intended to relieve the state from making proof that the offender was drunk, in the meaning of that word as commonly used."

In Shorter v. State, (1954) 234 Ind. 1, 122 N.E.2d 847, the Supreme Court of Indiana, in construing the statute under which Petitioner was tried and convicted, quoted the above language from Klaser v. State with approval and said further:

> "It is not necessary for a driver to be drunk in order to violate the statute making it unlawful

> for a person to operate a motor vehicle upon a public highway while 'under the influence of intoxicating liquor'; nor is it necessary to prove any specific degree of intoxication, but in each case where a person is charged with violation of the provisions of the act, the question as to whether the defendant was 'under the influence of intoxicating liquor' is one of fact to be determined by the court or jury from all the circumstances of the case."

The Court further stated:

> "'Under the influence of intoxicating liquor' are words in common use — they are not words of technical nature— and are well understood by the laity, who know they refer to the impaired condition of thought and action, and the loss of normal control of one's faculties to a marked degree, caused by drinking intoxicating liquors." (See 122 N.E.2d 849)

Petitioner also argues that the trial judge would have had to infer that the drinks Petitioner had were of a certain size and alcoholic percentage and to infer that Petitioner's physical make-up would result in intoxication. Again we repeat, it was not

necessary for Petitioner to be intoxicated to be under the influence of intoxicating liquor. The size of alcoholic drinks is sufficiently standardized that the judge, like a juror, could draw on his own knowlege and experience to know of what they consisted. The Petitioner was before him and he could judge his approximate weight, age, and other physical characteristics that would determine the effect a given amount of alcohol would have.

It is to be noted in the case before the court that, although two witnesses testified that Petitioner was not drunk, no witness testified that he was not under the influence of intoxicating liquor. The latter condition may be fairly inferred from that large quantity in liquor he had consumed plus the manner of his driving.

In Watts v. State of Indiana, (1949) 338 U.S. 49, 93 L.Ed. 1801, 69 S.Ct. 1347 This comment appears:

> "In the application of so embracing a constitutional concept as 'due process,' it would be idle to expect at all times unanimity of views. Nevertheless, in all the cases that have come here during the last decade from the courts of the various States in which it was claimed that the admission of coerced confessions vitiated convictions for murder, there has been complete agreement that any conflict in testimony as to what actually led to a contested confession is not this Court's concern. Such conflict comes here authoritatively resolved by the State's adjudication. Therefore only those elements of the events involved that are unquestioned in the State's version of what happened are relevant to the constitutional issue here.* * *

While we are not concerned here with conflicting evidence concerning the voluntariness of a confession, but with the sufficiency of the evidence to convict, the above doctrine is applicable. The Court of Appeals of Indiana,

sustained by the Supreme Court of Indiana, has determined that the evidence of Petitioner's being under the influence of intoxicating liquor at the time he killed the decedent was sufficient without the evidence of the Breatholyzer test and, although Petitioner contends there was a conflict in the evidence, he should not expect this court to resolve that conflict. Of course, as we have shown above, there is no conflict, for evidence that Petitioner was not intoxicated does not conflict with evidence that he was under the influence of intoxicants.

Petitioner argues that evidence of the strong odor of paint fumes from his car and the hard rain, creating dangerous road conditions, suggest the possibility that "the cause of the accident could have been something other than intoxication". That possibility was resolved against Petitioner by

the trial court and is not now subject to review.

Petitioner says, "In Klebs, the Court has apparently concluded that Witnesses Carr and Mitchell were disbelieved by the trial judge." That is not the case. On the authority of Shorter v. State, supra, the trial court could have accepted the testimony that Petitioner was not intoxicated, but believed from the uncontradicted evidence of the amount of liquor Petitioner had consumed and his erratic driving that he was under the influence of intoxicating liquor.

CONCLUSION

For the foregoing reasons it is respectfully submitted the petition for a writ of certiorari should be denied.

Respectfully submitted,

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